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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 * * * * *

4 LIBERTY MUTUAL

Plaintiff

5 VERSUS

CA-96-10804-DPW

6 BLACK & DECKER

7 Defendant

8 * * * * *

9 BEFORE THE HONORABLE DOUGLAS P. WOODLOCK

10 UNITED STATES DISTRICT COURT JUDGE

11 HEARING - BROS SITE

12 AUGUST 27, 2003

13 APPEARANCES:

14 RALPH T. LEPORE, III, ESQ. AND JANICE KELLEY
15 ROWAN, ESQ., Holland & Knight, LLP, 10 St. James
16 Avenue, Boston, Massachusetts 02116, on behalf
of the Plaintiff

17 JACK R. PIROZZOLO, ESQ. AND RICHARD L. BINDER, ESQ.,
18 Willcox, Pirozzolo & McCarthy, 50 Federal Street,
Boston, Massachusetts 02110, on behalf of the
Defendants

19 ALSO PRESENT: Linda Biagioni

20 Courtroom No. 1 - 3rd Floor
21 1 Courthouse Way
22 Boston, Massachusetts 02210
10:00 A.M. - 11:30 A.M.

23 Pamela R. Owens - Official Court Reporter
24 John Joseph Moakley District Courthouse
25 1 Courthouse Way - Suite 3200
Boston, Massachusetts 02210

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3 THE COURT: Well, just a kind of scheduling
4 thing. We're on for Jaffrey/Cross on September 17th and
5 then Bostick/Middleton October 3rd, is it --

6 MR. LEPORE: 8th.

7 THE COURT: 8th. Okay. What is the timing
8 that you anticipate for Beverly to be put in a context
9 of summary judgment?

10 MR. LEPORE: Summary judgment motions are due
11 September 5th, next Friday; and the oppositions are due
12 October 3, I think, four weeks after that. So, I would
13 expect, barring any necessary replies, if there were
14 replies, I can imagine we could do it in ten days. But
15 probably the end of October, Judge.

16 THE COURT: Okay. So, --

17 MR. LEPORE: Is that fair, Jack, for argument
18 on Beverly?

19 MR. PIROZZOLO: That's fine with me.

20 THE COURT: So, then, that would be the next
21 argument, I think.

22 MR. PIROZZOLO: I thought we had --

23 THE COURT: There's a long-term exposure
24 that's out there as well.

25 MR. PIROZZOLO: But we'll leave Cross as the

1 next time.

2 THE COURT: Yes. Cross is the 17th and then --

3 MR. PIROZZOLO: I thought we had a different
4 one for October.

5 MR. LEPORE: Yes, Bostick/Middleton.

6 MR. PIROZZOLO: You mean next after Bostick?

7 THE COURT: Yes. Okay. So, I will try and
8 set a date in October for that.

9 Now, there were lingering questions about
10 discovery in Beverly. Have they been worked out?

11 MR. LEPORE: By and large, we have worked --
12 in fact, Mr. Pirozzolo and I spoke yesterday. Over the
13 last six weeks, they have produced a numerous amount of
14 materials and documents, in large respect that are
15 responsive, but have raised other questions. My
16 preference -- and I talked to Mr. Pirozzolo last night
17 about this -- is to defer that motion until we've had a
18 chance to work it out over the next two weeks so that if
19 on September 17 when we're back, we'll be able to tell
20 you one way or the other whether there's anything
21 remaining if that's fair, Your Honor.

22 THE COURT: That's fine with me.

23 MR. PIROZZOLO: I see no reason to involve the
24 Court in this at this stage.

25 THE COURT: Okay. And it's not going to

1 interfere with the briefing?

2 MR. PIROZZOLO: No.

3 MR. LEPORE: I don't believe so. I think, as
4 I said, the documents that have been produced over the
5 last four to six weeks have been helpful.

6 THE COURT: Will be adequate. Okay.

7 Now, let me turn to the BROS and Brooks and
8 Huth materials. Again, the issue -- and it's becoming
9 more clear to me that the factual resolution is likely
10 to focus to a fairly large degree on the policies that
11 are involved and whether or not they can properly be
12 said to be involved. But I want to skip over that for a
13 moment. That is, I find it difficult to believe that I
14 can grant summary judgment with respect to the policies
15 really up to 1970, that really I'm dealing with policies
16 from '70 to '79 that can be dealt with on a summary
17 judgment basis.

18 MR. PIROZZOLO: Your Honor, I believe the
19 record shows that the policies through 1971 have no
20 pollution exclusion.

21 THE COURT: Well, I understand that. The
22 problem is --

23 MR. PIROZZOLO: The policies -- I don't think
24 it has ever been brought specifically to the Court's
25 attention. There is an excess policy that runs from

1 1970 through 1973 --

2 THE COURT: Right.

3 MR. PIROZZOLO: -- that has been no pollution
4 exclusion and that also does not have provisions that
5 the underlying policy terms are incorporated. So, there
6 would be a right to a defense.

7 THE COURT: Let me understand about the -- I
8 was thinking of the '69 to '70 excess policy, but '70 to
9 '73?

10 MR. PIROZZOLO: Nothing before 1971 has --

11 THE COURT: But there is an excess policy from
12 '70 to '73?

13 MR. PIROZZOLO: Excess policy from '70 to '73,
14 three-year policy.

15 THE COURT: You say that hasn't been brought
16 to my attention before?

17 MR. PIROZZOLO: Well, it's in the record, Your
18 Honor. I mean, we haven't emphasized it. It's in the
19 record. And it has no pollution exclusion. And I'm
20 losing the phrase. It does not incorporate in it --
21 follow form. It doesn't follow form. So it stands on
22 its own. So, if there's no underlying coverage, it
23 drops down. And we have the right under that policy to
24 a defense regardless of any arguments about the
25 pollution exclusion.

1 THE COURT: Well, let me -- I simply am
2 unfamiliar with it, so I haven't focused on it.

3 MR. PIROZZOLO: I didn't think so. I don't
4 think we have briefed it that way and I don't think we
5 have previously argued it orally.

6 THE COURT: All right.

7 MR. LEPORE: If I may, Your Honor, --

8 THE COURT: Right.

9 MR. LEPORE: -- with respect to that excess
10 policy, there is no duty to defend in any excess policy.
11 So, regardless, the drop-down has to do with the
12 indemnification issue. That's the purpose of excess
13 policies is to deal with that.

14 MR. PIROZZOLO: I don't think that's correct.
15 When the Court reads the excess policy, it will see that
16 there's a duty to defend.

17 THE COURT: Well, the Court hasn't, so the
18 Court better.

19 MR. PIROZZOLO: And, frankly, what tipped us
20 off on this in preparation for this hearing is to go
21 back and study the motion for summary judgment. And
22 Liberty Mutual's motion for summary judgment seeks a
23 judgment through March of 1973 which is before the
24 expiration of this excess policy. And in looking at it,
25 why did they move just through March of 1973? We then

1 realized that the excess policy imposes a defense
2 obligation regardless of the underlying --

3 THE COURT: Well, you know, I've tried to be
4 fairly diligent in going through these materials. And
5 it just didn't come out to me in this fashion. And
6 while I am loathe to impose additional obligations of
7 briefing and so on, I think it would be helpful to me to
8 have some briefing on the 1970 to '73 excess policy and
9 its implications here. But I can't talk about it
10 because I don't know it. And you're not going to teach
11 me enough about it --

12 MR. PIROZZOLO: Today.

13 THE COURT: -- today for me to deal with that.

14 MR. PIROZZOLO: We're happy to -- whatever the
15 Court says, we'll abide or submit on whatever schedule
16 the Court wants.

17 THE COURT: A couple of weeks.

18 MR. PIROZZOLO: Fine, no problem.

19 THE COURT: Two weeks to address the
20 implications of -- the dimensions of and the
21 implications of 1970 to '73 excess policy on this
22 matter. And it will probably be sharpened a bit by our
23 discussion here today.

24 MR. PIROZZOLO: Thank you, Your Honor.

25 THE COURT: But that -- putting that to one

1 side, dealing with it, I think the only thing that is
2 available for summary judgment, although I haven't
3 finally decided, is the policies that can provide a
4 basis for summary judgment and the policies from '70 to
5 '79 here. The previous policies seem to me to raise
6 factual questions about their existence, their
7 provisions, that sort of thing that I hope to be able to
8 clarify for you at some point.

9 But for purposes of discussion here today, I
10 want to focus on really '70 to '79.

11 Now, turning to the BROS circumstances -- and
12 maybe I want to go back a bit on this to deal with
13 pollution exclusion a bit more specifically with the
14 deletion of the pollution exclusion in this context --
15 my view of the deletion provision has come to the belief
16 that we have to be dealing with operations in Maryland.
17 And I have come, I think, to view the Minut-Lube, if
18 I pronounce that correctly, case as to some degree
19 dealing with the essential operations of the entity, a
20 lubrication business and, consequently, distinguishable
21 from the activities of Black & Decker that led to the
22 potential here for exposure. And, so, I would be
23 inclined to believe that the deletion provision is going
24 to displace any claim after 1971 of Black & Decker for
25 indemnification and perhaps if it hinges on that,

1 although I don't think it does, the duty to defend.
2 Now, I'll hear some argument about that, but I'm pretty
3 much on that ground. Mr. Pirozzolo, you may want to
4 address the question of the deletion provision here. If
5 it's there, you're pretty much dead in the water as to
6 indemnification, aren't you?

7 MR. PIROZZOLO: If I understand Your Honor's
8 comment, first, within the four corners of the
9 provision, as is included in the policy --

10 THE COURT: Right.

11 MR. PIROZZOLO: -- it says the exclusion is
12 not applicable to operations, its disjunctive operations --

13 THE COURT: Right.

14 MR. PIROZZOLO: -- or occurrences in Maryland.
15 And the facts of this case are such that Black & Decker's
16 alleged fault or alleged action that gives rise to the
17 claim against it arises out of its plant in Maryland and
18 its delivering its waste to A&A Disposal in Maryland.
19 And, therefore, I think it falls squarely within the
20 provision that it is arising under an operation in
21 Maryland.

22 THE COURT: That turns on the belief that this
23 is an occurrence in Maryland, doesn't it?

24 MR. PIROZZOLO: There's operation or
25 occurrence.

1 THE COURT: It's not an operation in Maryland
2 unless everything you do that goes out of the state
3 becomes an operation in Maryland. It seems to me fairly
4 clear -- and in this, I'm influenced, I suppose, by the
5 SJC in Nashua having in mind, of course, that we're
6 dealing with New Hampshire law, but the reading that
7 they give to this provision. I have looked carefully at
8 Minut-Lube because I think it arguably supports
9 your case. But I view that as a special kind of
10 operation, special intensively oil discharge petroleum
11 discharge operation, and would distinguish it on those
12 grounds. But if I were to take and say whenever it
13 comes to it, the Maryland courts are going to say that
14 "we block with Nashua," doesn't that end the matter
15 for you? They're treating the same -- essentially the
16 same provision.

17 MR. PIROZZOLO: But I don't think they would.
18 Because you begin with the proposition that there should
19 not be a pollution exclusion at all in Maryland, that
20 Maryland bars the pollution exclusion. Liberty Mutual
21 has placed into the policy a cleverly-drafted pollution
22 exclusion which now they argue will take it outside
23 -- take their policy outside the policy of Maryland. We
24 have a case that we cite, the Alcolac case --

25 THE COURT: Right.

1 MR. PIROZZOLO: -- where the operation -- the
2 generator was in Missouri and the pollution was in
3 Missouri. And it was held that the pollution exclusion,
4 very similar to the one involved here, did not apply.
5 And that was so determined by the District Court in
6 Maryland which would presumably be closer to Maryland
7 law than Nashua was. That's 16 F.Supp 1541.

8 THE COURT: Well, you see, the problem I have
9 with Alcolac is the suggestion of ambiguity that it
10 seems to rest on. I guess it puts it at direct
11 opposition to Nashua. I'm not sure that I think it
12 is as well developed as Nashua. I'm not sure that I
13 would be inclined to follow it here. Of course, it's
14 not the definitive statement of Maryland law because
15 it's a --

16 MR. PIROZZOLO: With respect, I don't think
17 either the 4th Circuit or the Court of Appeals in
18 Maryland would follow Nashua.

19 THE COURT: Well, that's your -- as you said,
20 the question for me is let's assume -- as I do -- that
21 they find that more persuasive than Alcolac, what
22 does that do to your case?

23 MR. PIROZZOLO: Well, we still have pre-
24 pollution exclusion.

25 THE COURT: For summary judgment purposes,

1 which is how I raise this by talking about the period
2 '70 to -- we're really talking about the period '70 to
3 '71, aren't we?

4 MR. PIROZZOLO: We would have pre-pollution
5 exclusion activities on the site. Well, it's a little
6 difficult because Black & Decker denies that it ever
7 shipped material to this site.

8 THE COURT: I'll go back to that. But let me
9 say --

10 MR. PIROZZOLO: But the allegations -- the
11 claims would --

12 THE COURT: Let me say that I think that there
13 is the potentiality for liability for activities on the
14 site by Black & Decker. Whether denied or not, there
15 is. That's a duty to defend kind of issue, but it
16 frames it. Aren't we then talking about '70 to '71?

17 MR. PIROZZOLO: And also pre-'70.

18 THE COURT: Well, pre-'70. I've indicated my
19 view that that's not summary judgment material because
20 of the uncertainties in respect of whether and, if so,
21 what dimensions there are to the policies that Liberty
22 had -- or Black & Decker had with Liberty.

23 MR. PIROZZOLO: One other -- before I answer
24 that question directly, I'd point out the Liller
25 case which defines operations. That's a Maryland

1 it says -- it embraces the Webster's New International
2 Dictionary definition of "operations" as "the whole
3 process of planning for and operating a business or
4 other organized unit." And in a non-environmental case,
5 it says it is "a course or a procedure of productive or
6 industrial activity." So that at the very least, there
7 is a fact dispute as to whether Black & Decker engaged
8 in operations and whether the operations of which we are
9 concerned were conducted entirely in Maryland. So, I
10 don't think it's -- I don't think the Court could grant
11 summary judgment for Liberty Mutual as a matter of law.
12 What ought to happen is the definition should be given
13 to the jury and the jury should then determine whether
14 or not under these circumstances these are operations in
15 Maryland.

16 So, for summary judgment purposes, it would
17 probably defeat our motion for summary judgment.

18 THE COURT: Yes.

19 MR. PIROZZOLO: But I don't believe that it
20 leads to granting Liberty Mutual's motion for summary
21 judgment.

22 THE COURT: If I accept the characterization
23 of operations for purposes of this provision as, at a
24 minimum, ambiguous, that's really what it comes down
25 to, doesn't it, for that to stay alive?

1 MR. PIROZZOLO: But at some point, the Court
2 will define that. But then it would be the question for
3 the jury to fit in the facts to see if the facts --

4 THE COURT: Well, but let's say that I provide a
5 definition that effectively mimics Nashua. The only
6 way that you get to the jury is if you say, "No, no,
7 this is ambiguous." And the jury has to decide what they
8 meant by "operations" under these circumstances.

9 MR. PIROZZOLO: I could see it going that way.

10 THE COURT: All right.

11 MR. PIROZZOLO: The more direct answer to the
12 Court's question is that it's all a question of which
13 policies are implicated and whether we would be
14 implicating the policies right through the '70s or just
15 the policies up to 1971 or, based on what I've just
16 alerted the Court to about the excess policies, the
17 policies through 1973.

18 THE COURT: Okay. Let's just assume that
19 we're -- because I want to clarify for my own purposes
20 where the disputes are in the policies themselves
21 that I think are subject to summary judgment or, more
22 specifically, one policy that's subject to summary
23 judgment.

24 We're dealing from '70 to '71. And I think
25 that I want to understand the view of Liberty on even

1 that thin eye of a needle, because I read Bausch & Lomb
2 fairly broadly here and I want to understand how you
3 think you're going to get out of it for '70 and '71.

4 MR. LEPORE: The second Bausch & Lomb, Your
5 Honor?

6 THE COURT: Yes.

7 MR. LEPORE: The '99 decision?

8 THE COURT: Yes.

9 MR. LEPORE: I think the second Bausch & Lomb
10 decision actually can be helpful to Liberty Mutual in
11 the following respects, Your Honor. It addresses the
12 situation where the Court concluded that coverage could
13 be determined if the damage to the environment occurred
14 after the dumping. We acknowledge that that is the
15 issue. Ours is the reverse situation. And that is as
16 follows, Your Honor: There is no evidence whatsoever --
17 to the extent that there's any evidence that BROS
18 accepted any B&D waste -- that it occurred before 1973.
19 There is no evidence at all.

20 THE COURT: But now we're talking -- let me
21 focus it on duty to defend.

22 MR. LEPORE: Yes.

23 THE COURT: And there, you don't get to rely
24 upon extrinsic evidence.

25 MR. LEPORE: Let me address that in three

1 separate points, Your Honor, because -- and I'm glad
2 that you've focused on that.

3 The duty to defend in Maryland is that you
4 have to deal with the four corners of the complaint and
5 the four corners of the policy.

6 THE COURT: And the insurer can adduce
7 extrinsic evidence to support that.

8 MR. LEPORE: The insured, you mean?

9 THE COURT: The insured. Excuse me.

10 MR. LEPORE: That's right. However, there is
11 a case that -- there are two cases, Your Honor, that
12 have come down recently. I'm going to give you one
13 cite. The Northern Insurance Company of New York versus
14 Baltimore Business Communications, 2003 U.S.App. Lexis
15 12318.

16 THE COURT: Hold on a second, 12318.

17 MR. LEPORE: Fourth Circuit, June 19th, 2003.
18 And I'm going to just recite that and then I'll get to
19 the second case. The Fourth Circuit pointed out that,
20 "Significantly, Maryland recognizes two limited
21 exceptions to the general rule against an insurer's use
22 of extrinsic evidence. First, when the underlying tort
23 plaintiff has amended his allegations against the
24 insured, the insurer may utilize the amendments as
25 extrinsic evidence. If the amended allegations no

1 longer raise a potentiality for coverage, the insurer
2 no longer has a duty to defend."

3 Okay. Now, that doesn't apply here, that
4 first exception. I will acknowledge that.

5 THE COURT: And it sounds wrong. All
6 that's happened is that you've got a new operative
7 document.

8 MR. LEPORE: That is correct.

9 THE COURT: I mean, it's not extrinsic
10 evidence. It's simply the new -- the four corners are
11 redefined.

12 MR. LEPORE: Exactly. But this is where we
13 end up going to the second exception, Your Honor. And
14 that is in Universal Underwriters v. Lowe, 135 Md.App.
15 122 --

16 THE COURT: Hold on. I'm slow.

17 MR. LEPORE: -- the dual cite -- I'm sorry,
18 135 Md.App. 122. And the dual cite is 761, Atl.2d 997,
19 2000.

20 THE COURT: This is the Maryland intermediate
21 appellate court?

22 MR. LEPORE: Yes. That's correct. And it
23 says, "In other words, an insurer may utilize
24 uncontroverted extrinsic evidence from the underlying
25 lawsuit if such evidence clearly establishes that the

1 suit's allegations are beyond the scope of coverage."

2 Now, I point these out to you because we
3 start from the premise that we're dealing with the four
4 corners of the so-called complaint and the four corners
5 of the policy. Over the last couple of years, we have
6 seen two exceptions to that. And it has to do with
7 throughout all of our arguments over the past several
8 months, Your Honor, having to do with understanding that
9 the duty to defend is at a specific point in time to be
10 determined with coverage for the overriding, underlying
11 lawsuit to be determined at a later date, which is what
12 the insurer is entitled to do.

13 THE COURT: Let me be sure I understand what
14 you mean by that. I look at -- or we look at the time
15 of the -- I won't say tender because that --

16 MR. LEPORE: Right.

17 THE COURT: -- incorporates a different
18 concept, but more or less at the time that the insured
19 is put on notice of the potentiality.

20 MR. LEPORE: Right.

21 THE COURT: Then your duty to defend, if it
22 is within the potentiality, continues until there is
23 some basis for saying there's no longer a potentiality.
24 I'm using the language of Maryland. Is that it?

25 MR. LEPORE: Fair enough. Now let's start

1 going backwards in time. Liberty Mutual became aware
2 of this underlying claim in March of '94. That's
3 uncontroverted.

4 THE COURT: Now we're just dealing with BROS.

5 MR. LEPORE: Yes. What did they become aware
6 of in March of '94? They were presented with a cover
7 letter and two complaints that date back to October of
8 '92, I believe. October, yes, of '92. Okay. Liberty
9 didn't find out until about -- whatever, how many months
10 that is -- 17 or 18 months after Black & Decker became
11 aware of this. What is important to understand about
12 what Liberty became aware of in March of '94 is that in
13 the cover letter and in the two underlying complaints
14 that were submitted with the cover letter was that
15 Black & Decker was not a defendant in either of those
16 lawsuits. That is uncontroverted.

17 THE COURT: All right.

18 MR. LEPORE: Okay. So the question is when
19 Liberty Mutual became aware of this claim in '94, was
20 that a suit?

21 THE COURT: All right.

22 MR. LEPORE: We all acknowledge that Maryland
23 hasn't addressed that situation yet.

24 THE COURT: Yes.

25 MR. LEPORE: And the question is whether they

1 are going to follow certain case law and decide that it
2 was a suit or whether they're going to follow other
3 cases in the country where it wasn't a suit. All right.
4 Our position, of course, is that it wasn't a suit. It
5 didn't trigger anything. Now, assume for a moment that
6 Your Honor concludes otherwise, that that letter --

7 THE COURT: What is the duty --

8 MR. LEPORE: Yes.

9 THE COURT: Do you have a duty at that point
10 when there is uncertainty about that then to seek a
11 declaratory judgment? That is to say, you're faced with
12 case law around the country. You know, I suppose it's
13 -- I keep forgetting the Maine case. But Maine goes one
14 way and Massachusetts goes the other --

15 MR. LEPORE: That's correct.

16 THE COURT: -- on this. Do you simply take
17 your chances?

18 MR. LEPORE: Maryland law is not decided on
19 that. And that's a fair question to ask.

20 THE COURT: Right.

21 MR. LEPORE: And I understand where Your Honor
22 is headed. So, let me just follow the thought process
23 for just a moment.

24 THE COURT: Okay.

25 MR. LEPORE: Assume for a moment that Your

1 Honor decides that this letter is sufficient to
2 transform the letter into a suit so that it's within the
3 coverage arguably. There is no case law in Maryland
4 that decides what a suit is. We start from that
5 premise.

6 THE COURT: All right.

7 MR. LEPORE: There are only a few cases in the
8 country that have decided whether a PRP letter or a DEP
9 letter is a suit. There's only one case that I'm aware
10 of -- and that is the Zecco/Hazen line of cases here in
11 Massachusetts that sets out the criteria for determining
12 whether a private party letter is a suit. This under
13 any set of circumstances must be considered a private
14 party letter. It is a letter from the BROS settlement
15 committee inviting Black & Decker to participate in a
16 settlement process.

17 THE COURT: Well, giving them an alternative,
18 one track or the other. Do you want to be in
19 litigation? Do you want to be in settlement?

20 MR. LEPORE: And as we know, they were never
21 sued. In fact, your question earlier to Mr. Pirozzolo
22 about indemnity is not particularly helpful here because
23 there is no indemnity. All we're dealing with are
24 defense costs.

25 THE COURT: All right.

1 MR. LEPORE: And we're only dealing with duty
2 to defend. So, the question then becomes at the time
3 that Liberty Mutual became aware of this in '94, what
4 did they have in front of them? They have a letter
5 inviting Black & Decker to participate in a settlement
6 process. It says in it -- it does say "or the
7 alternative is to face a lawsuit." The face -- the
8 uncontroverted fact is that they weren't sued. Black &
9 Decker went through the settlement process, refused to
10 settle, and never got sued. Okay. Now, if you look
11 at the Zecco and Hazen line of cases, they set
12 forth the criterion for determining whether or not
13 a PRP letter is a suit or not a suit. They talk about
14 three different criteria: First, a failure to comply
15 with the letter should itself somehow alter the
16 substantiality of the insured's liability. Okay. You
17 look at this particular letter. It doesn't do anything
18 like that because all it does is say if you don't agree,
19 we're going to sue you. It doesn't establish liability.

20 THE COURT: Isn't that enough?

21 MR. LEPORE: No.

22 THE COURT: That is, it says -- whether or not
23 it's realized, it says it's going to result in the
24 lawsuit.

25 MR. LEPORE: Which never happened.

1 THE COURT: That's what you -- well, but never
2 happened is something occurs after the time at which
3 there is what loosely I'll call the tender.

4 MR. LEPORE: Which I will get to in a second.
5 Because the 16-month delay is important, Your Honor.
6 It's vitally important and I'll get to that in a second.
7 But I need to go through the Hazen/Zecco line first.
8 Because I firmly believe that this was not a suit that
9 would have triggered any duty to defend.

10 The second part of that is that the SJC here
11 has said that government letters, as opposed to private
12 party letters, carry much more substantial weight. The
13 government generally follows through on their threats.

14 Number three, the tone of the letter is
15 relevant to determine whether or not it's a suit that
16 triggers the duty to defend. This letter, however
17 described, was an invitation. In fact, the word is in
18 there. "We invite you to participate in a settlement
19 process."

20 So, we look at those three factors. Does the
21 failure to comply with the settlement process alter the
22 insured's liability? No. It doesn't do anything. If
23 they had complied, which they took the invitation, it
24 didn't do anything because nothing happened. If they
25 didn't comply, nothing happened because they never got

1 sued.

2 Number two, this is plainly a private party
3 letter.

4 Number three, it was an invitation.

5 So I don't think there was a suit. But here's
6 the vitally important point. When Liberty Mutual became
7 aware of this in March of '94, Black & Decker had
8 already been involved in this settlement process for 18
9 months. It is uncontroverted that during that 18-month
10 period of time, they obtained information which
11 established that they had no connection to the BROS
12 site. Now, they knew that in March of '94. They didn't
13 tell Liberty Mutual that. Now, why is that? I don't
14 know. But why is it that they ignored their own
15 counsel's advice to tell Liberty Mutual about the years
16 of involvement? I don't know. I can only speculate as
17 to that.

18 But the bottom line is at that point when
19 Black & Decker notified Liberty Mutual of this so-called
20 claim and lawsuit, they had definitive uncontroverted
21 information that they had involvement at BROS before
22 1973. In fact, there is a letter that's in the record
23 from Swidler & Berlin, the counsel, that as early
24 as April 19 of 1993, they knew that there was no
25 involvement before '73. There were letters and they

1 are all in the record.

2 THE COURT: Well, let me ask this: So that's
3 their position.

4 MR. LEPORE: I'm sorry?

5 THE COURT: That's their position, that they
6 have no involvement.

7 MR. LEPORE: Right.

8 THE COURT: From whose perspective do we view
9 this? Isn't it whether or not it is possible for an
10 alternative position to be taken?

11 ME. LEPORE: That's a very good question,
12 except that the only opposing party arguably was the
13 BROS settlement committee. Okay.

14 THE COURT: Not necessarily. It's tiering.
15 And ultimately, I suppose EPA can get into it. They,
16 for a variety of reasons, don't go down the tiers. They
17 look to second- and third-party actions to do that. But
18 ultimately, the obligation is to EPA -- or for the
19 remediation is to EPA.

20 MR. LEPORE: I agree with that.

21 THE COURT: So it's attenuated, but it's still
22 there.

23 MR. LEPORE: And, yet, there's still no
24 evidence. No one is even alleging that B&D was at the
25 BROS site before '73. No one. Now, let me --

1 THE COURT: Well, but what do I -- is it Mr.
2 Goldstein? Is that the fellow's name? I'm trying to
3 remember who the fellow -- the son of the founder of
4 A&A.

5 MR. LEPORE: That's right.

6 MR. PIROZZOLO: Before Mr. Lepore was on his
7 feet. But the record shows that A&A picked up waste
8 from Black & Decker all through the '60s and that the
9 son of Mr. -- I believe it's Mr. Goldstein -- that he
10 picked up waste at Black & Decker when he was still a
11 teenager and puts that in the -- at least in the late
12 '60s. And there is a document in the record. This is
13 at Appendix R, Appendix O10, that shows on a site
14 questionnaire that shows that Black & Decker waste --
15 I'm sorry -- that A&A waste went to the BROS site from
16 1964 through 1979. Their record -- the extrinsic
17 evidence is abundant except there is the possibility of
18 a claim that Black & Decker waste went to the BROS site.
19 Of course, Black & Decker has maintained right along
20 that none of it went to the BROS site.

21 THE COURT: But let me just pause for a moment
22 to focus on this. So we're back to there's somebody out
23 there who says that it did. Black & Decker says that
24 it didn't. Well, you know, I look --

25 MR. LEPORE: But that's not true, Your Honor.

1 That's a misstatement of the record. The record
2 reflects that it is possible that A&A picked up waste
3 from B&D. Okay. Goldstein said that, but he doesn't
4 remember specifically. But there's no connection
5 between A&A picking up the waste and bringing it to
6 BROS. There is evidence that at that period of time,
7 A&A brought that particular waste to Burke's. There is
8 no connection between A&A picking up B&D waste and
9 bringing it to BROS until March of 1973. That is
10 uncontroverted. There is nothing in the record,
11 notwithstanding everything that they have done to create
12 an issue of fact here, there is nothing to make that
13 connection before March of 1973. And I say that
14 emphatically because, Your Honor, there is information
15 in the record. There is a letter that I just referred
16 to, April 29th of 1993. There's a September 20th, 1993,
17 letter from Swidler & Berlin to Ms. Biagioni.

18 THE COURT: Well, but, see, let me just stop
19 on that. That there are internal discussions in which
20 they say that they did not -- that their waste never
21 made its way to BROS, it seems to me, is interesting,
22 but not immediately relevant on the question of duty to
23 defend.

24 The more fundamental question is whether or
25 not a finder -- there is a potentiality that a finder of

1 evidence. Are you permitted to do that? I don't think
2 so.

3 THE COURT: Why not?

4 MR. LEPORE: And I'll tell you why. I think
5 what you're entitled to do -- and follow me out, hear me
6 out. If you're going to look back in 1994 as to what
7 Black & Decker knew and include extrinsic evidence at
8 the time that they had a letter inviting them to
9 participate and two complaints of which they were
10 neither a defendant in. What extrinsic evidence are you
11 permitted to look at? Are you only permitted to look at
12 the stuff that's helpful to them as opposed to all of
13 the stuff that they knew at the time, including a letter
14 from the BROS settlement committee setting forth the
15 parameters of the years of involvemenet?

16 THE COURT: Well, I think I have to look at
17 all that stuff.

18 MR. LEPORE: That's my point. And if you do
19 that --

20 THE COURT: But let me just step back for a
21 minute.

22 MR. LEPORE: Okay.

23 THE COURT: But if there is enough in that
24 to create a question of fact, then the existence of
25 contrary positions is interesting, but not compelling on